PP

v.

NASEEM HAIDER & ORS

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ROHANA YUSUF JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEAL NO: W-05-44-03-2012]
28 MARCH 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Trial judge invoked provisions of s. 37(b), (da), (g) - Rule against double presumptions - Prima facie case - Whether established - Whether trial judge erred by invoking double presumptions against respondents - Whether serious misdirection - Whether respondents prejudiced - Whether defence ought not to have been called*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(b), (da), (g) - Rule against double presumptions - Whether breached - Prima facie case - Whether trial judge erred by invoking double presumptions against respondents - Whether serious misdirection - Whether respondents prejudiced - Whether defence ought not to have been called*

The respondents were charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). In the High Court, the trial judge invoked the provisions of ss. 37(b), 37(g) alongside with s. 37(da) of the DDA against the respondents. It was found that the respondents had successfully raised a reasonable doubt against the prosecution's case and they were accordingly acquitted and discharged. Dissatisfied, the prosecution appealed to this court. The issue raised was that the trial judge erred in his evaluation since the judge had reconsidered the prosecution's case and did not properly consider the defence. The respondents, however, asserted that there was a serious misdirection committed by the trial judge where His Lordship had breached the rule against double presumptions in finding that a *prima facie* case had been established against the respondents. Before embarking on the sole ground of appeal proffered by the prosecution, this court considered the issue on whether the learned trial judge was right in calling for the defence.

Held (dismissing appeal)
Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) The trial judge erred in invoking the double presumptions against the respondents in concluding that a *prima facie* case was established by the prosecution. The rule against double presumption had been breached. This was a serious misdirection and on this ground alone, the respondents ought to have been acquitted. Even at the defence stage, the invocation of the s. 37(g) presumption was also a misdirection. The respondents were put in a position so adverse in that they had to rebut not only the s. 37(da) presumption but also the other two presumptions under s. 37(b) and 37(g). (paras 29, 33 & 34)

(2) The respondents were prejudiced and the error made by the trial judge was so serious that it merited this court's intervention and pronouncement. In the circumstances, it was not deemed necessary to consider the prosecution's appeal. However, the order of acquittal and discharge pronounced by the trial judge was affirmed, although for a different reason. (paras 33, 35 & 36)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden telah dituduh atas kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Di Mahkamah Tinggi, hakim bicara telah membangkitkan peruntukan-peruntukan s. 37(b), 37(g) bersama-sama dengan s. 37(da) ADB terhadap responden-responden. Mahkamah mendapati bahawa responden-responden telah berjaya membangkitkan keraguan munasabah terhadap kes pendakwaan dan dengan itu, mereka telah dibebaskan dan dilepaskan. Tidak berpuas hati, pihak pendakwaan telah merayu ke mahkamah ini. Isu yang dibangkitkan adalah bahawa hakim bicara khilaf dalam penilaiannya memandangkan beliau telah mempertimbangkan semula kes pendakwaan dan tidak mempertimbangkan kes pembelaan secukupnya. Responden-responden, walau bagaimanapun, menghujahkan bahawa terdapat salah arahan serius oleh hakim bicara apabila beliau telah melanggar peraturan terhadap anggapan berganda dalam mendapati bahawa satu kes *prima facie* telah dibuktikan terhadap responden-responden. Sebelum mempertimbangkan alasan rayuan yang

dikemukakan oleh pihak pendakwaan, mahkamah ini telah mempertimbangkan isu sama ada hakim bicara betul dalam memanggil pembelaan.

Diputuskan (menolak rayuan)
Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara khilaf dalam membangkitkan anggapan berganda terhadap responden-responden dalam memutuskan bahawa satu kes *prima facie* telah dibuktikan oleh pihak pendakwaan. Peraturan terhadap anggapan berganda telah diingkari. Ini adalah satu salah arahan serius dan atas alasan ini sahaja, responden-responden sepatutnya dibebaskan. Walaupun pada peringkat pembelaan, kebangkitan anggapan di bawah s. 37(g) juga merupakan satu salah arahan. Responden-responden diletakkan dalam suatu keadaan bertentangan di mana mereka terpaksa mematahkan bukan sahaja anggapan di bawah s. 37(da) malah juga terhadap dua lagi anggapan lain di bawah s. 37(b) dan 37(g).

(2) Responden-responden telah diprejudis dan kesilapan yang dibuat oleh hakim bicara adalah serius dan mewajarkan campur tangan mahkamah ini. Dalam keadaan ini, rayuan pihak pendakwaan tidak perlu dipertimbangkan. Walau bagaimanapun, perintah pelepasan dan pembebasan yang diberikan oleh hakim bicara adalah disahkan, walaupun untuk alasan yang berbeza.

Case(s) referred to:
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(b), (g), 37(da)

For the prosecution - Mangaiarkarasi; DPP
For the 1st respondent - Gobind Singh Deo (Mohd Haijan Omar with him); M/s Karpal Singh & Co
For the 2nd & 3rd respondents - Karpal Singh (Sanjeet Kaur with him); M/s Karpal Singh & Co
For the 4th respondent - Afifuddin Ahmad Hafifi; M/s Salehuddin Saidin & Assocs

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-67-2009]

Reported by Kumitha Abd Majid

JUDGMENT

Balia Yusof Wahi JCA:

[1] The respondents were charged for an offence of trafficking in dangerous drugs and the charge against them reads as follows:

> Bahawa kamu bersama-sama pada 19 Jun 2009 jam lebih kurang 10.30 malam di bilik No. 601, Lanson Place, No. 1 Jalan Ampang Hilir, di dalam Daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur, di dalam meneruskan niat bersama kamu semua, telah mengedar dadah berbahaya sejumlah berat 1369.25 gram (1170.9 gram Heroin dan 198.35 gram Monoacetylmorphines), dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.

[2] They were acquitted and discharged by the High Court after a full trial.

[3] This is an appeal by the Public Prosecutor against the said order of acquittal and discharge. We heard the appeal on 18 November 2013 and we reserved judgment.

Brief Facts

[4] On 19 June at about 8.30pm, PW12 together with his team of police personnel went to Lanson Place, No. 1 Jalan Ampang Hilir, Kuala Lumpur upon receiving information on a drug trafficking activity. Upon arrival at the said place PW12 met the security supervisor (PW9) of the place who then brought PW12 and his team to the 6th floor, to Room 601. PW9 brought along the key to Room 601.

[5] Using the key, PW12 tried opening the door to Room 601. However, his effort failed because the room was locked from inside. PW12 then instructed his men to break open the door.

[6] Upon entering the room, PW12 saw the first and second respondents running towards the bedroom from the living room and they were arrested by the members of the raiding party.

[7] The third and fourth respondents who were in the bedroom were also arrested and they were all brought to the living room.

[8] In the living room, PW12 recovered the following items:

(i) Two transparent blue plastic packets containing brown powdery substance on the sofa;

(ii) One plastic packet containing grey granular substance on the floor, near the sofa;

(iii) One Toshiba brand laptop (P69) on the floor near the round table. A screw driver was found taped to the laptop with a black tape. PW12 did further examination of the said laptop and recovered one transparent plastic packet wrapped in black tape containing grey powdery substance and one white plastic bag containing grey powdery substance. At the back of the monitor screen, PW12 recovered two transparent plastic packets containing grey powdery substance.

[9] The granular and powdery substances were sent to the chemist (PW3) for analysis and were found to contain 1,170.9g of heroin and 198.25g of monoacetylmorphines.

[10] At the end of the prosecution's case, the learned trial judge had found a *prima facie* case against all the respondents and called upon them to enter their defence.

[11] Having heard the defence case, the learned trial judge found that the respondents had successfully raised a reasonable doubt against the prosecution's case and they were accordingly acquitted and discharged. Hence the present appeal by the Public Prosecutor.

The Appeal

[12] Only one ground of appeal was canvassed before us and that is the learned trial judge had erred in his evaluation of the defence because instead of evaluating the defence, His Lordship had re-considered the prosecution's case and did not properly or adequately consider the defence. In their defence, the respondents merely put the blame on one another and did not in any way cast any reasonable doubt on the prosecution's case.

[13] Notably, according to the learned deputy, the learned trial judge had made a contradictory finding as regard to common intention between what was found at the close of the prosecution case with that found at the end of the defence case.

[14] In reply, learned counsel for the respondents submitted that the learned trial judge had erred in the first place in calling for the defence against all the respondents.

[15] Mr Karpal Singh counsel for the second and third respondents submitted that common intention was not proven and his clients ought not to have been called to enter their defence. As to the learned deputy's submission on the failure of the trial judge to evaluate the defence, Mr Karpal Singh submitted that what the learned trial judge did was merely to re-evaluate and review the entire evidence in the light of the defence put forward by the respondents. That was within the purview and indeed the judicial duty of the trial judge.

[16] En Mohd Haijan learned counsel for the first respondent adopted *in toto* the submissions of Mr Karpal Singh.

[17] En Afifuddin, learned counsel for the fourth respondent likewise submitted that there was no common intention between the respondents. The only evidence against the fourth respondent was that she was merely present in the bedroom, not even in the living room (hall) of the said Room 601. The fourth respondent's story was confirmed by the evidence of the first respondent who testified that they were merely visitors and were bringing Pakistani food to the room. The room was booked by the third respondent who came along with the second respondent. The learned trial judge erred in calling for the fourth respondent's defence and in concluding that there was common intention on the part of the fourth respondent.

[18] Learned counsel further submitted that in re-evaluating the whole of the evidence after the end of the defence case, the learned trial judge was right in concluding that the element of common intention was lacking at least on the part of his client, the fourth respondent.

[19] It was further submitted by En Afifuddin that there was a serious misdirection committed by the learned trial judge in breaching the rule against double presumption in finding a *prima facie* case being established against the respondents.

[20] Before embarking on the sole ground of appeal proffered by the learned deputy, it is most appropriate that we should first consider the issue raised by the respondent's counsel namely whether the learned trial judge was in the first place right in calling for the defence.

[21] This will bring us to the issue of whether the learned trial judge did invoke double presumption in finding that a *prima facie* case had been established against all the respondents. A

[22] We pause here to note that in concluding that a *prima facie* case had been established, the learned trial judge had found *inter alia* as follows. At p. 395 of the appeal record jilid 2, His Lordship had stated: B

13. Penemuan oleh Mahkamah

(a) Persoalan penting di dalam kes ini ialah sama ada ke empat-empat 'T' mempunyai pemilikan ekslusif kepada bilik 601 Lanson Place pada masa serbuan dilakukan? Saya merujuk kepada anggapan di bawah s. 37(b) DDA yang berbunyi: C

> S. 37 a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises. D

[23] His Lordship then went on to consider the evidence of the various prosecution witnesses in particular the evidence of SP6, SP7, SP12, SP13, SP14 and concluded at sub-para. (g) of the said para. 13 as follows: E

(g) Hasil daripada penelitian dan penilaian maksima saya kepada keterangan-keterangan saksi pendakwaan di dalam kes ini, saya berpuas hati bahawa kesemua 'T' pada masa tangkapan adalah penghuni kepada bilik tersebut dan mereka mempunyai pengawalan ekslusif ke atas bilik 601 pada masa serbuan dilakukan. F
(Rujuk kes *PP v. Sim Ah Ba & Anor* [1997] 4 MLJ 47). G

[24] It is crystal clear that the provision of s. 37(b) of the DDA was invoked to deem the respondents as occupiers of the said Room 601.

[25] It is also clear from the judgment that knowledge on the part of the respondents were inferred from the surrounding facts and circumstances as adduced from the prosecution evidence. H

[26] We are of the view that the learned trial judge had drawn the proper inference and was right in concluding that the respondents had the requisite knowledge and hence possession of the impugned drugs. I

[27] To connect the respondents to the charge of trafficking in the said drugs, the learned trial judge had found at p. 399 of the same appeal record jilid 2 as follows:

> (n) Maka apabila kedua-dua elemen di atas dibuktikan, adalah betul bagi pendakwaan untuk mengambil anggapan pengedaran melalui s. 37(da)(iii) ADB 1952, khususnya apabila jumlah berat dadah yang dirampas adalah melebihi jumlah timbangan minima menurut s. 37(da)(iii) dan s. 37(da)(iiia) ADB.

[28] After having found that there exist common intention among them and finding no break in the chain of evidence, the learned trial judge concluded that a *prima facie* case had been proven.

[29] In our considered view, it is most apparent that the learned trial judge had invoked both the provisions of s. 37(b) and 37(da) of the DDA. The rule against double presumption has been breached (*Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170). This is a serious misdirection. On this ground alone the respondents ought to have been acquitted.

[30] Perusing further the grounds of judgment, we note that the learned trial judge had, in considering whether the respondents had cast a reasonable doubt against the prosecution case, adverted to s. 37(g) of the DDA.

[31] At p. 415 of the appeal record jilid 2, this is what the learned trial judge had stated as the finding of the court (penemuan mahkamah):

> Penemuan Mahkamah
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> 40. Isu penting untuk diputuskan ialah sama ada pihak pendakwaan telah berjaya membuktikan kes terhadap kesemua T melampaui keraguan yang munasabah? Kerana beban pembuktian ke atas pihak pendakwaan tidak pernah berubah (Rujuk kes *Nagappan a/l Kuppusamy v. PP* [1998] 2 MLJ 53).
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> 41.Seterusnya sama ada pembelaan yang dibawa oleh kesemua T tersebut telah berjaya menimbulkan suatu keraguan yang munasabah terhadap kes *prima facie* pihak pendakwaan? (Rujuk kes *PP v. Teh Eng Wah* [1999] 8 CLJ 451).
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> 42. Sama ada seksyen 37(b) dan seksyen 37(g) ADB, 1952 terpakai di dalam kes ini? Seksyen 37(b) berbunyi seperti berikut:

> ... a person until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises.

Seksyen 37(g) Akta Dadah Berbahaya 1952 berbunyi seperti berikut:

> If any dangerous drug is found concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises.

> 43. Keterangan daripada saksi-saksi pendakwaan dan pembelaan menunjukkan bahawa T2 dan T3 merupakan penghuni berdaftar kepada bilik 601 Hotel Lanson Place, manakala T1 dan T4 hanyalah sebagai pengunjung kepada bilik berkenaan, pada masa tangkapan dilaksanakan menurut kes pembelaan ke empat-empat mereka didapati berada di dalam bilik berkenaan, maka adalah menjadi kehendak undang-undang bagi mereka untuk membuktikan sebaliknya mengenai anggapan penghunian tersebut. Sebagai pengunjung, T1 dan T4 telah berjaya menolak anggapan penghunian tersebut. Bagaimanapun kesemua mereka perlu menunjukkan bukti sebaliknya yang masih terletak di atas mereka mengenai anggapan di bawah seksyen 37(g) Akta yang sama.

[32] We must confess that we are unable to understand as to whether this other provision in s. 37(g) of the DDA was invoked against the respondents and if so when and at which stage of the case. This is quite baffling. It leaves a lingering doubt in our mind as to whether this other presumption was indeed invoked by the learned trial judge. Reading the above said passage, clearly show an extra burden to rebut was placed on the respondents.

[33] Be that as it may, the learned trial judge had erred in invoking this provision. The respondents were put in a position so adverse in that they have to rebut not only the s. 37(da) presumption but also the other two presumptions in s. 37(b) and s. 37(g). This is most unsatisfactory and the respondents were prejudiced. While the end result of the case may be favourable to the respondents, the error made by the learned trial judge is so serious and merits our intervention and pronouncement.

[34] In the light of the above, we are of the considered view that the learned trial judge had erred in invoking the double presumptions against the respondents in concluding that a *prima facie* case was established by the prosecution. There was a

misdirection by the learned trial judge and we find that the defence ought not to have been called in the first place. And even at the defence stage, the invocation of the s. 37(g) presumption is also a misdirection.

[35] In the circumstances of the case, we do not deem it necessary to consider the appeal of the Public Prosecutor on the ground of the learned trial judge's failure to evaluate the defence.

[36] For the reasons aforesaid, we found no merit in the appeal and the appeal is hereby dismissed. The order of acquittal and discharge pronounced by the learned trial judge is affirmed, although for a different reason.